A

HONG KWI SEONG

v.

GANAD MEDIA SDN BHD

B

FEDERAL COURT, PUTRAJAYA
HASHIM YUSOFF FCJ
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
ZALEHA ZAHARI FCJ
C JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02(i)-98 & 96-12-2012(W)]
8 OCTOBER 2013

D ***CIVIL PROCEDURE:*** *Judgment - Setting aside - Delay in filing application within time frame - Failure to obtain enlargement of time - Whether application failed - Rules of the High Court 1980, O. 3 r. 5 & O. 42 r. 13*

E ***CIVIL PROCEDURE:*** *Appeal - Leave to appeal - Appeal to Federal Court - Questions posed for determination - Whether court could refuse to answer questions - Whether requirements under s. 96 Courts of Judicature Act 1964 satisfied - Rules of the Federal Court 1995, r. 106 - Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors*

F The respondent obtained a money judgment against the appellant. However, despite having served the sealed order on the appellant's solicitors, the judgment debt remained unpaid. The appellant did not file an appeal or an application to set aside the judgment. On 12 December 2005, an order was obtained to
G examine the judgment debtor. When the appellant failed to appear on the given date, the respondent obtained an order for payment of the judgment debt in instalments and the said order was served personally on the appellant. Again, no appeal or application to set aside that payment order was filed. Given the fact that the time
H to make the payments in the said order had expired, an application was made on 22 August 2007 to amend it. On 9 January 2008, the amended payment order was served on the appellant and no appeal or any application was filed to set it aside. Since the appellant failed to make payments on the due dates, the court

I

granted a committal order and a warrant of committal. On 19 April 2010, the appellant filed two applications *vide* encls. 129 and 130 to set aside the served amended payment order, the committal order and the warrant of committal. The High Court and the Court of Appeal had respectively dismissed both the enclosures with costs. Hence, these appeals. Leave to appeal was granted and the questions that arose for the court's determination were in relation to (i) the powers of a court to direct payment by instalments of a judgment debt under O. 48 of the Rules of the High Court 1980 ('RHC'); and (ii) whether a judgment debt could be enforced by an order of committal.

Held (striking out appeals *in limine* with costs)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) The relevant provision for any setting aside application falls under O. 42 r. 13 of the RHC. A party intending to set aside an order or judgment must make his application and serve it on the party who obtained the order or judgment, within 30 days after receipt of the order or judgment by him. If the application is made outside the 30 days period, unless time is enlarged, the application must fail. (paras 11 & 12)

(2) On the facts, no enlargement of time was ever applied for by the appellant prior to the filing of encls. 129 and 130. A brief scrutiny of the dates of all of the relevant orders and their dates of service showed that the appellant was out of time by at least a year. Despite knowing that encls. 129 and 130 were filed pursuant to O. 42 r. 13 of the RHC, the appellant had disregarded the time factor prescribed to regularise the application. Both the enclosures were thus incompetent since no application was filed to extend time pursuant to O. 3 r. 5 of the RHC prior to filing of those applications. (para 13)

(3) The court was not prevented from refusing to answer the questions for determination on certain legal grounds despite leave having been granted. Since the requirements of s. 96 of the Courts of Judicature Act 1964 were not satisfied, exacerbated by the want of extension of time and by the empowerment of r. 106 of the Rules of the Federal Court

A 1995, this court was entitled to refrain from answering the leave questions (*Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* (foll); *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* (foll)). (paras 15 & 18)

B

Bahasa Malaysia *Translation Of Headnotes*

Responden telah memperolehi penghakiman kewangan terhadap perayu. Walaupun perintah bermeterai telah disampaikan kepada peguamcara perayu, hutang penghakiman masih belum dibayar. C Perayu tidak memfailkan rayuan atau permohonan untuk mengenepikan penghakiman tersebut. Pada 12 Disember 2005, satu perintah telah diperolehi untuk memeriksa penghutang penghakiman. Apabila perayu gagal hadir pada tarikh yang ditetapkan, responden telah memperolehi perintah untuk D pembayaran hutang penghakiman melalui ansuran dan perintah tersebut diserahkan secara kediri kepada perayu. Sekali lagi, masih tiada rayuan atau permohonan untuk mengenepikan perintah bayaran difailkan. Memandangkan masa yang diberi untuk membuat bayaran dalam perintah tersebut telah luput, satu permohonan E dibuat pada 22 Ogos 2007 untuk memindanya. Pada 9 Januari 2008, perintah bayaran terpinda telah diserahkan kepada perayu dan tiada rayuan atau permohonan dibuat untuk mengenepikannya. Oleh kerana perayu gagal membuat bayaran pada tarikh-tarikh yang ditetapkan, mahkamah telah membenarkan perintah pengkomitan F dan waran pengkomitan dikeluarkan. Pada 19 April 2010, perayu memfailkan dua permohonan melalui lampiran-lampiran 129 dan 130 untuk mengenepikan perintah bayaran terpinda, perintah pengkomitan dan waran pengkomitan. Mahkamah Tinggi dan Mahkamah Rayuan telah masing-masing menolak kedua-dua G lampiran tersebut dengan kos. Oleh itu, rayuan-rayuan ini. Kebenaran merayu diberikan dan persoalan yang dibangkitkan untuk diputuskan oleh mahkamah adalah berkaitan dengan (i) kuasa mahkamah untuk mengarah bayaran melalui ansuran bagi suatu hutang penghakiman di bawah A. 48 Kaedah-Kaedah H Mahkamah Tinggi 1980 ('KMT'); dan (ii) sama ada hutang penghakiman boleh dilaksanakan melalui perintah pengkomitan.

I

Diputuskan (membatalkan rayuan-rayuan *in limine* dengan kos)

Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Peruntukan berkenaan pengenepian permohonan jatuh di bawah A. 42 k. 13 KMT. Satu-satu pihak yang berniat untuk mengenepikan perintah atau penghakiman perlu membuat permohonan dan menyerahkannya kepada pihak yang telah memperolehi perintah atau penghakiman itu, dalam masa 30 hari selepas menerima perintah atau penghakiman tersebut olehnya. Jika permohonan dibuat luar daripada jangka masa 30 hari, kecuali jika terdapat lanjutan masa, permohonan tersebut akan gagal.

(2) Berdasarkan fakta, tiada lanjutan masa dipohon oleh perayu sebelum memfailkan lampiran-lampiran 129 dan 130. Penelitian atas tarikh-tarikh kesemua perintah berkenaan dan tarikh penyampaiannya menunjukkan bahawa perayu berada luar daripada jangka masa selama satu tahun. Walaupun mempunyai pengetahuan bahawa lampiran-lampiran 129 dan 130 difailkan berikutan A. 42 k. 13 KMT, perayu telah mengabaikan faktor masa yang dinyatakan untuk melaraskan permohonan. Kedua-dua lampiran itu adalah tidak kompeten memandangkan tiada permohonan difailkan untuk melanjutkan masa menurut A. 3 k. 5 KMT sebelum memfailkan permohonan-permohonan tersebut.

(3) Mahkamah tidak dihalang daripada keengganan untuk menjawab soalan-soalan yang perlu diputuskan atas beberapa alasan undang-undang walaupun kebenaran telah diberikan. Memandangkan keperluan-keperluan di bawah s. 96 Akta Mahkamah Kehakiman 1964 tidak dipatuhi, diburukkan lagi dengan kehendak lanjutan masa dan di bawah kuasa k. 106 Kaedah-Kaedah Mahkamah Persekutuan 1995, mahkamah ini layak untuk mengelak daripada menjawab persoalan-persoalan bagi kebenaran merayu. (*Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* (diikuti); *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* (diikuti)).

Case(s) referred to:

Development & Commercial Bank Ltd v. Dinesh Kumar Jashbhai Nagjibhai & Ors [2002] 3 CLJ 108 HC ***(refd)***

Hock Hua Bank Bhd v. Sahari bin Murid [1980] 1 LNS 92 FC ***(refd)***

Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2009] 2 CLJ 1 FC ***(foll)***

Ong Guan Teck & Ors v. Hijjas Kasturi [1982] CLJ 31; [1982] CLJ (Rep) 616 HC ***(refd)***

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(foll)***

Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd [2005] 3 CLJ 825 FC ***(refd)***

VVDN Sockalingam Chettiar And Two Others v. KRPRS M Somasundaram Chettiar [1940] 1 LNS 114 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 96(a)
Rules of Court 2012, O. 48
Rules of the Federal Court 1995, r. 106
Rules of the High Court 1980, O. 3 r. 5, O. 42 r. 13, O. 48

For the appellant - Lambert Rasa-Ratnam (Mong Chung Seng with him); M/s Lee Hishammuddin Allen & Gledhill

For the respondent - Sharmala Batumalai (Mabel Nirmala James with her); M/s Hamzah, Sulaiman & Partners

[Editor's note: For the Court of Appeal judgment, please see Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal [2012] 8 CLJ 667]

Reported by Kumitha Abd Majid

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] Two appeals were heard simultaneously before us namely Civil Appeals 2(i)-96-2012(W) and 2(i)-98-12-2012(W). The questions for our determination pertain to the powers of a court to direct payment by instalments of a judgment debt under O. 48 Rules of the High Court 1980 (now O. 48, Rules of Court 2012), and whether a judgment debt could be enforced by an order of committal.

[2] The questions emanate from encls. 129 and 130 filed by the appellant. They relate to the payment order of 12 October 2006 as amended on 29 November 2007 (served on 9 January 2008) and a committal order dated 5 November 2008 (served on

14 January 2009), and a further committal order and warrant of committal both dated 10 April 2009. No appeals were filed against any of those perfected orders. A

[3] The amended payment order, together with the committal order of 5 November 2008, which were properly served were also never set aside within 30 days after their service. The 30 day rule is provided for under O. 42 r. 13 of the Rules of the High Court 1980 (RHC). The committal order and warrant of committal, both dated 10 April 2009, are awaiting execution. B

[4] Instead of complying with the requirements of O. 42 r. 13 of the RHC after being served with those orders, the appellant did nothing for a year. On 19 April 2010 he suddenly woke up and filed two setting aside applications namely the abovementioned encls. 129 and 130. *Vide* those enclosures the appellant wanted to set aside the served amended payment order, the committal order of 5 November 2008 (served on 14 January 2009) and 14 April 2009 committal order and warrant of committal. The appellant also wanted to set aside the last two perfected orders despite having failed to purge his contempt pursuant to the 5 November 2008 committal order. It must be understood that 14 April 2009 orders stemmed from the order of 5 November 2008 and unless the latter was satisfied and resolved, the application to set aside 14 April 2009 orders was doomed to fail. C D E

[5] By some oversight, and without ensuring their competency, these two enclosures were heard by the High Court and the Court of Appeal on the merits. They were respectively dismissed with costs by the High Court and the Court of Appeal on 10 October 2010 and 15 June 2012. The appellant filed a successful leave application, hence the appeal before us. F G

[6] Instead of answering the questions posed for our determination we have decided to strike out these appeals *in limine* ie, on the preliminaries. To understand our reasoning it will be quite useful if we lay down the background facts first. H

Chronology Of Events

[7] The respondent had obtained a money judgment (the judgment debt) against the appellant after a full trial on 31 December 1999. The sealed order was served on the appellant's solicitors but the judgment debt remained unpaid. No appeal was filed or applied to be set aside by the appellant. On I

A 12 December 2005 an order was obtained to examine the judgment debtor. On 15 July 2006 the said 12 December 2005 Order was served personally on the appellant wherein he was directed to attend court on 30 August 2006. Solicitors for both parties attended court on the given date but matters were
B adjourned to 12 October 2006. *Vide* a letter from the respondent's solicitors, the appellant was directed to attend court on 12 October 2006 for the hearing of the JDS.

[8] When the appellant failed to appear on the given date, the
C respondent obtained an order for payment of the judgment debt in instalments (payment order). After 30 attempts to serve the payment order on the appellant it was eventually served personally on 12 October 2006. Again no appeal or application to set aside that payment order was filed despite it being served. Given the
D fact that the time to make payments in the said order had expired, an application was made on 22 August 2007 to amend it. That application was served on him, but again on 29 November 2007 the application was heard in his absence, whereupon an order in terms was granted. On 9 January 2008 the payment order as
E amended was served personally on the appellant. Again there was no appeal or any application filed to set it aside.

[9] History repeated itself when the appellant failed to make payments on the due dates and the respondent proceeded to
F obtain leave to issue committal proceedings at the High Court. On 5 November 2008, the High Court granted the committal order in the absence of the appellant, after being satisfied that the appellant had been served with all the necessary papers. The committal order of 5 November 2008, together with the
G accompanying court's covering letter, supported by the translations, were served personally on the appellant by the court bailiff on 14 January 2009. As that order suffered short service, the matter was postponed until it was eventually heard on 10 April 2009. Unfortunately, and not surprisingly, again the
H appellant refused to attend court despite the documents having been served on him. On that date the court granted a committal order and warrant of committal as he had been found guilty of contempt; for this contempt the appellant was committed to prison for four months from the date of arrest. These orders were
I regular orders, which merely needed enforcement, hence the warrant of committal.

[10] As said earlier, we have decided to strike out these appeals *in limine* as we find the appeals before us incompetent. Our reasons are obvious. At the risk of repetition, there was no appeal filed against the judgment debt order, the amended payment order, or the committal order of 5 November 2008 which culminated in the warrant of committal being issued against the appellant.

[11] As appeals are creatures of statute, and none were filed at any time against all of the orders issued against the appellant in this case, we shall refrain from discussing the effect of that failure except to state that no variation of a judgment regularly obtained after it has been entered or an order after it is drawn is permitted, unless it falls under the slip rule (*Hock Hua Bank Bhd v. Sahari bin Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143). What is left is the right of the appellant to set aside those orders as reflected by his applications. As mentioned earlier, the relevant provision for any setting aside application falls under O. 42 r. 13 of the RHC, and it reads:

> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[12] In other words a party intending to set aside an order or judgment must make his application and serve it on the party who obtained the order or judgment within 30 days after receipt of the order or judgment by him. If the application is made outside the 30 day period, unless time is enlarged, the application must fail (*Development & Commercial Bank Ltd v. Dinesh Kumar Jashbhai Nagjibhai & Ors* [2002] 3 CLJ 108). Whether an enlargement of time will be granted, on the premise that an application was been filed, will depend very much on the facts and circumstances of that application (*VVDN Sockalingam Chettiar And Two Others v. KRPRS M Somasundaram Chettiar* [1940] 1 LNS 114; [1941] MLJ 103 CA).

[13] It is crystal clear that no enlargement of time was ever applied for by the appellant prior to the filing of encls. 129 and 130. A brief scrutiny of the dates of all of the relevant orders, and their dates of service, shows that the appellant was out of time

by at least a year. Despite knowing that encls. 129 and 130 were filed pursuant to O. 42 r. 13 RHC the appellant had disregarded the time factor prescribed to regularise the application. With no application filed to extend time pursuant to O. 3 r. 5 RHC prior to filing of those applications (and of course no reasonable explanation was given for the said delay), encls. 129 and 130 were incompetent.

[14] The failure to adhere to the preliminary requirement to extend time in the circumstances of the case must be dealt with strictly, as otherwise the rules requiring an extension of time will end up as a dead letter. They, *prima facie*, must be obeyed for otherwise the party in breach of the rules will defeat the very purpose and object of the need to observe the time line (as an analogy see *Ong Guan Teck & Ors v. Hijjas Kasturi* [1982] CLJ 31; [1982] CLJ (Rep) 616.

[15] What about the fact that leave was granted earlier in this appeal hence mandating this court to answer the questions? We hold the view that this court is not prevented from refusing to answer the questions for determination on certain legal grounds despite leave having been granted. We refer to two cases justifying our position. In the case of *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2009] 2 CLJ 1, referring to the case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349; [2003] 3 MLJ 257 the Federal Court remarked:

> The respondent's counsel also submitted that even though leave had been granted on the four questions, yet as decided by the Federal Court in *Sri Kelangkota* (*sic*), the Federal Court was not prevented from reconsidering the issue of whether leave ought to have been granted in the first place. In that case, the respondent's counsel submitted similarly to the situation as in this case, where it was decided at p. 369:
>
> > Coming back to the questions formulated for determination by this Court, it is our view that the questions do not involve a question of importance upon which further argument and a decision of this court would be to public advantage. The questions merely relate to the set of facts in the appeal and the application of the settled principles of law as is plain from the judgment of the Court of Appeal. As such, they do not come within the ambit of s. 96(a) of

> the CJA and therefore, there is no necessity or purpose for this court to answer the questions posed regardless of the fact that leave to appeal has in fact been granted at an earlier hearing.
>
> We agree with the learned counsel that the same approach need to be taken by us in this case, as we also find that the questions posed are questions of fact and not questions of law. We also find that the questions 'do not involve a question of importance upon which further argument and a decision of this court would be to public advantage'. There is no necessity or purpose for this court to answer the questions (emphasis added).

[16] The case of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* (*supra*) was also referred to in the case of *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd* [2005] 3 CLJ 825 which likewise held that the court was entitled not to answer the questions on the ground that they did not come within the ambit of s. 96(a) of the Courts of Judicature Act 1964.

[17] We now refer to r. 106 Rules of the Federal Court 1995, which empowers us to strike out this appeal and it reads:

> 106. Ancillary powers of the Court.
>
> The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all power which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

[18] Alluding to the same reasoning as discussed in the above cases of *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor*, *Karya Lagenda Sdn Bhd* and *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd*, which entitle us to refrain from answering the leave questions if the requirements of s. 96 of the CJA are not satisfied, exacerbated by the want of extension of time, and empowered by r. 106, the appeals are hereby struck out with costs.